No. 16,649

IN THE

United States Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,
Appellant and Defendant,

-vs-

MILDRED MURPHY,
Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S BRIEF

JAMES A. POORE, JR.
ROBERT A. POORE
URBAN L. ROTH
404 Silver Bow Block, Butte, Montana
Attorneys for Appellant and Defendant

Filed February....., 1960

.....Clerk

McKee Printing Co. Butte, Montana

No. 16,649

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,
Appellant and Defendant,

-vs-

MILDRED MURPHY,
Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S BRIEF

JAMES A. POORE, JR.
ROBERT A. POORE
URBAN L. ROTH
404 Silver Bow Block, Butte, Montana
Attorneys for Appellant and Defendant

SUBJECT INDEX

TABLE OF CASES, STATUTES AND TEXTS

CASES

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

TABLE OF CASES, STATUTES AND TEXTS—
Continued

STATUTES

TREATISES

No. 16,649

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

SAFEWAY STORES, INC.,
Appellant and Defendant,

-vs-

MILDRED MURPHY,
Appellee and Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

APPELLANT'S BRIEF

STATEMENT OF THE PLEADINGS AND FACTS AS TO JURISDICTION

Plaintiff's complaint was filed in the Montana District Court and was removed to the Federal District Court upon the grounds of diversity of citizenship and amount in controversy exceeding $10,000.00. (R. 5.)

Title 28, Section 1332, U. S. C. A.

The pleading showing the existence of diversity of citizenship is the defendant's Petition for Removal which was included in the Record on Appeal (R. 410) but was

not designated for printing by either party and is included in this brief as Appendix A.

The Circuit Court has jurisdiction to review the final decision of the district trial court overruling defendant's alternative motions for Judgment n.o.v. or for a New Trial. (R. 11.)

Title 28, Section 1291, U. S. C. A.

STATEMENT OF THE CASE

This is a personal injury case arising out of the plaintiff's fall in defendant's store on June 24, 1958, where she had gone to shop. The case was tried to a jury and a verdict of $36,500.00 rendered for the plaintiff. The defendant moved for a directed verdict at the close of the plaintiff's case in chief which was tried on the theory that res ipsa loquitur was relevant, and the court took the same under advisement. The defendant then put on its defense and the plaintiff her rebuttal; and at the close of all of the evidence the defendant moved again for a directed verdict which likewise was taken under advisement. The jury was instructed, and no objections were made by either party to these instructions. The jury returned the aforementioned verdict for the plaintiff, and defendant moved alternatively for a judgment n.o.v. or for a new trial upon the same grounds, as to the judgment, which it had urged in its motions for directed verdicts, and, as to the new trial, that the verdict was excessive.

By its order of July 1, 1959, (R. 13), the court denied all of defendant's motions and ruled that under the law of a split of authority in the California district courts,

as followed, as to the faction adopted by the trial court, by the Supreme Court of Oklahoma, there was sufficient proof of the existence of a dangerously slippery floor condition at the time and place of the accident to support the jury's finding of negligence. The trial court held in this diversity case, and irrespective of the Rules of Decision Act and *Erie -vs- Tompkins*, that these three California district court cases and the Oklahoma case had, by virtue of the giving of certain instructions, become the "law of the case" and "that *under such law* there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant". (R. 13) (Emphasis supplied.)

This appeal was prosecuted in due course from that final ruling of the trial court, and presents the following:

QUESTIONS INVOLVED

(1) Where the doctrine of *Erie -vs- Tompkins* is controlling as here in this Montana, diversity-of-citizenship case; and where, as here, the instructions as tendered and given were based, as they should and had to be, on Montana law as supplemented by general law and the weight of authority where Montana courts have not spoken, is it not then error for a trial court after verdict and judgment and at a time when it is ruling on defendant's alternative motions for judgment n.o.v. or for a new trial, to abandon the mandate of *Erie -vs- Tompkins* and the substantive law of Montana and weight of authority generally and weigh the sufficiency of the evidence on the crucial issue of any proof of a dangerously slippery floor condition, at the time and place of the accident, under

one line of a split of California district court cases as followed by an Oklahoma Supreme Court case?

(2) Where basic instructions are tendered by the parties and are wholly consonant with substantive Montana law and the weight of authority generally, (as they must be in this federal court, diversity-of-citizenship case), is there any reason why it should be "apparent" (R. 13) to a party upon the amendment of its tendered instruction that the interpretive law of the case was thereby being shifted by the court from the weight of case law authority across the land to one fractional line of California inferior court cases as followed by an Oklahoma Supreme Court case—especially when the amendment itself correctly states the substantive law of Montana and the weight of authority generally?

(3) Does a federal trial court in a Montana, diversity-of-citizenship case have any power or authority for any reason whatsoever to abandon the rule of the Rules of Decision Act as construed by the case of *Erie -vs- Tompkins* and adopt a rule as to quantum of proof in a negligence case not representative either of Montana law or the weight of authority across the country?

(4) Where, as in this case, the only proof of the existence of a dangerously slippery condition on an asphalt tile floor which had been washed and waxed the previous night was the plaintiff's fall itself and her description of the floor as "shiny" and "shinier than she had ever seen it before", does not the weight of case law authority, which is applicable in absence of a Montana case in point, hold that there has been a failure of proof of the existence of a dangerously slippery condition entitling

the defendant to judgment, n.o.v.—especially when, as here, there was the undisputed, positive testimony of four witnesses, who went immediately to where the plaintiff had fallen, that the floor was not slippery; that although they inspected the floor in the area of the plaintiff's fall, they found no foreign substance, accumulation or liquid and saw no slide or skid marks; and where, as here, there was no mark or blotch on the plaintiff's clothing, and although the floor was not changed in any way after her accident, no one of the approximately 550 people in the store that same day experienced any slip or slide or fall or reported any slippery condition?

(5) Where a plaintiff is awarded $36,500.00 for injuries received in a slip and fall case where she was dazed by the fall but not rendered unconscious; was never hospitalized; had doctor bills of approximately $30.00, X-ray costs of $110.00, drug bills of less than $10.00, pleaded loss of wages of about $3,000.00 and totaling as to such special damages the sum of $3,150.00; and in her pleadings she assessed her general damages at $10,000.00, and at trial put in no proof whatsoever as to life expectancy or mortality tables or present worth of future wages from which the jury could lawfully and reasonably estimate damages for loss of future earnings, is not such a verdict of $36,500 which includes $20,851.50 of unproven loss of future wages, grossly excessive and not justified by the evidence and so entitling the defendant to a new trial and a fair, impartial and lawful assessment of damages?

(6) Under the facts of this case, as alluded to in the foregoing Questions Involved, where the clear weight of

the evidence wholly fails to support the verdict or judgment, do not the ends of justice require a new trial if, for some reason, judgment is not entered for the defendant?

MANNER IN WHICH THE QUESTIONS INVOLVED WERE RAISED

The first four Questions Involved were raised by the following portion of the court's order denying defendant's motion for judgment n.o.v. which had challenged the sufficiency of the evidence to prove the existence of a dangerously slippery condition at the time and place of the accident in question and by the court's predicating such denial, not upon substantive Montana law as supplemented by the weight of general case law authority, *but rather* upon the rules announced by one fraction of a split of California district court authority, to-wit:

> "It is Therefore Ordered and this does order that the defendant's motion for judgment in accordance with motion for directed verdict or for new trial be and the same hereby is denied in its entirety.
>
> *Sufficiency of Evidence*
>
> By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase 'or the creation of a dangerously slippery condition', so that the instruction read 'a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *,' it became apparent the Court was adopting the law an-

nounced in the cases of Nicola vs. Pacific Gas & Electric Co., (Cal.) 123 P 2d 529; Cagle vs. Bakersfield Medical Group, (Cal.) 241 P 2d 1013; Baker vs. Mannings, Inc., (Cal.) 265 P 2d 96; and Chase vs. Perry, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection and thus the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of defendant." (R. 13.)

The fifth and sixth Questions Involved were raised by defendant's Motion for a New Trial which was made after judgment pursuant to Rule 50, Federal Rules of Civil Procedure, and was coupled with the motion for judgment n.o.v.

SPECIFICATIONS OF ERROR

(1) The court erred in not ascertaining and applying, at all times during the trial of the case, and particularly at the time of reserving and then ruling on defendant's motions for directed verdicts and judgment n.o.v., the substantive law of Montana as supplemented, where silent, by the weight of case-law authority across the nation.

(2) After the law of the case had been determined by the adoption and giving without objection of the instructions which expressed, as they had to under the Rules of Decision Act and *Erie -vs- Tompkins,* the substantive law of Montana as supplemented, where silent, by the weight of case-law authority across the nation, the trial court erred in then abandoning such substantive Montana and general law and seizing upon a narrow line of minor-

ity rule cases as the basic standard against which to weigh defendant's challenge that there had been no proof of a breach of duty and that plaintiff had not proved a prima facie case.

(3) The court erred in not granting defendant's motion for judgment, n.o.v.

(4) The court erred in not granting defendant's motion for a new trial.

ARGUMENT

Summary of Argument

Defendant's motions for directed verdict and judgment n.o.v. challenged the sufficiency of the evidence to prove a prima facie case and the existence of a dangerously slippery floor condition at the time and place of the accident. Defendant's other basic challenge was to the excessive verdict. The record is therefore divided into testimony as to the negligence issue and testimony as to damages.

Because the Circuit Court will doubtless want to refer again and again to the evidence as to the facts of the accident and the condition of the floor, an Index and Summary of Negligence Issue Testimony most favorable to the plaintiff has been affixed as Appendix B commencing at page 71.

The argument as to the First Specification of Error, at pages 10 to 16 establishes the subsistingly pervading rule of the Rules of Decision Act as construed by *Erie -vs- Tompkins*.

In the Second Specification of Error, which is argued at pages 17 to 23 of the brief, the appellant establishes

that although the law of the case, as established by the instructions in question which were given without objection, followed the mandate of *Erie -vs- Tompkins* and set forth the substantive law of Montana, as supplemented where silent by the weight of case law authority across the country, the court erroneously departed from such law of the case when thereafter it ruled (R. 13) upon defendant's motion for judgment n.o.v. in that the court seized as "the law of the case" three California Circuit Court decisions representing one side of a split of authority in that jurisdiction and an Oklahoma case following such minority rule.

In its argument as to the Third Specification of Error, at pages 23 to 52 the appellant points out the absence of any proof of the existence of a dangerously slippery condition at the time and place of the accident and shows the errors in the court's analysis of the proof on the negligence issue. Then by applying the facts as viewed most favorably to the plaintiff to the majority rule, which is controlling in this case, the appellant establishes that its motion for judgment n.o.v. should have been granted.

The final portion of the brief, commencing at page 52, deals with the grossly excessive verdict under the facts proved and the applicable law and establishes that the trial court erred in not granting defendant's Motion for a New Trial.

Specification of Error I

The Trial Court Erred in Not Ascertaining and Applying at All Times During the Trial of the Case, and Particularly at the Times of Reserving and Then Ruling on Defendant's Motions for Directed Verdicts and Judgment N.O.V., the Substantive Law of Montana as Supplemented, Where Silent, By the Weight of Case-Law Authority Across the Nation as Required By the Mandate of *Erie -vs- Tompkins*.

By way of preface to the court's opinion holding the evidence sufficient to sustain the verdict and judgment, the court said:

> "By the giving of plaintiff's instruction No. 8 to the effect that the right of the proprietor to wax a floor is not superior to his duty to use care and caution to avoid injury to his patrons, and by the amendment of defendant's Instruction No. 12 by the insertion of the phrase 'or the creation of a dangerously slippery condition,' so that the instruction read 'a store owner * * * may treat his floor with wax * * * unless he is negligent in the materials he uses for such treatment or the manner of applying them or the creation of a dangerously slippery condition * * *,' it became apparent the Court was adopting the law announced in the cases of Nicola vs. Pacific Gas & Electric Co., (Cal.) 123 P 2d 529; Cagle vs. Bakersfield Medical Group, (Cal.) 241 P 2d 1013; Baker vs. Mannings, Inc., (Cal.) 265 P 2d 96; and Chase vs. Perry, (Okl.) 326 P 2d 809. Plaintiff's instruction No. 8, and defendant's instruction No. 12, as amended, were given without objection, and thus *the law announced in the foregoing cases became the law of this case. The Court is of the opinion that under such law there is sufficient evidence in this case to support the jury's finding of negligence on the part of the defendant.*" (Emphasis supplied.) (R. 13.)

This was error! The trial court had no power or authority to make any law other than the substantive law

of Montana as supplemented, where silent, by the weight of authority of general case-law across the country, the "Law of the Case"! And, particularly is this so when, as established by the argument and citations in the next section of this brief under Specification of Error II, these basic instructions on standard of care as tendered and amended and given by the court *did conform* to the mandate of *Erie -vs- Tompkins* and were the substantive law of Montana as supplemented by general case law throughout the country!

Federal jurisdiction in this case is based upon the amount in controversy exceeding $10,000.00 and the diversity of citizenship of the parties.

Title 28, Section 1332, U. S. C. A.

The Rules of Decision is controlling.

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

Title 28, U. S. C. A., Section 1652.

The purpose of this section is to make certain that in all matters where the courts are exercising jurisdiction, as here, by virtue of diversity of citizenship, the Federal Courts will apply as their rules of decision the law of the State, unwritten as well as written.

Erie R. Co. -vs- Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1937);

West -vs- American Telephone & Telegraph Co., 311 U.S. 223, 61 S. Ct. 179, 85 L. Ed. 139 (1940);

14 Am. Jur. 307, "Courts" Sec. 94.

The rule of *Erie -vs- Tompkins* pervades all substantive law portions of the case at all times during the trial and even on appeal. The trial court and the Court of Appeals must continuously seek for and be mindful of the substantive law of the state forum. Thus, if while this appeal is pending, the Montana Supreme Court should hand down a decision as to standard of care, burden of proof, and generally the quantum of proof necessary to prove a prima facie case in one of these unexplained, slip-and-fall situations, this Circuit Court would have to adopt that Montana decision as being controlling—irrespective of the fact that it conflicted with the trial court's ruling and irrespective of the fact that at the time it was made, the trial court appeared to be soundly applying Montana law.

> *Virginia Vandenbark -vs- Owens-Illinois Glass Company*, 311 U.S. 538, 85 L. Ed. 327, 61 S. Ct. 347 (1940).

While there is a substantial body of Montana law on tripping and slip-and-fall cases, as outlined hereinafter at page 18, there is no Montana case similar to this where the fall was unexplained and there was no proof that the floor was dangerously slippery at the time and place of the accident. The rule then under the *Erie -vs- Tompkins* mandate is to either apply the majority rule as announced by the weight of case-law authority across the country or to endeavor to ascertain what the Montana Supreme Court would do if this case were before it. Probably both rules are one and the same, and under Montana law they certainly are; for in the leading Montana case of *Chichas -vs- Foley Bros. Grocery Co.*, 83

Mont. 575, 581, 236 Pac. 361, 362 (1925) which involved an invitee's falling down an unguarded elevator shaft in a store, the court said:

> "The *general rule* deducible from the authorities, *and of which we voice approval*, is clearly stated in 20 R.C.L. p. 66, as follows: 'A merchant or shopkeeper, who maintains warerooms for the exhibition and sale of goods, impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and entitled to all the rights of invited persons. The floors and passageways of the building MUST BE KEPT IN A REASONABLY SAFE CONDITION, and the same is true of stairways, elevators, doors, windows, and other places and appliances." (Emphasis supplied.)

As will hereinafter appear under the argument of the Second Specification of Error, the two instructions seized upon by the court as having effected a change in the *Erie -vs- Tompkins* rule dealt with basic law of the standard of the defendant's duty of care to its patrons. And the *Chichas* case specifically considered that issue in Montana and adopted the "general rule" of a duty to maintain *reasonably safe* premises. It is therefore apparent that the Federal Court in this Montana diversity case must apply the *general rule* in ascertaining the finer points of the rule of standard of care and proof of its violation in situations where the Montana court has not spoken.

Jackson -vs- Flohr, (CA 9th 1955) 227 F. (2d) 607.

Beck -vs- F. W. Woolworth Co., (D.C. Iowa, 1953) 111 F. Supp. 824.

Federal Court warranted in assuming that highest court of state would follow generally recognized rule and such Federal Court would not be justified

in assuming that such state court would follow a single decision from another jurisdiction.

Werthan Bag. Corp. -vs- Agnew, (C.A. Tenn. 1953) 202 F. (2d) 119.

Federal Court to look to the common law as declared by the state courts of the country.

Hudson -vs- American Oil Co., (D.C. Va. 1957) 152 F. Supp. 757.

Federal Court to assume that weight of authority will prevail in the state.

Fair -vs- U. S., (C.A. Tex. 1956) 234 F. (2d) 288.

Federal Court to look to "general law".

U. S. -vs- Jones, (C.A. Kan. 1956) 228 F. (2d) 84.

Federal Court to look to "weight of authority".

AND THE FEDERAL TRIAL COURT IS NEVER AT LIBERTY TO STOP SEEKING FOR MONTANA LAW AND THE GENERAL RULE IN ABSENCE OF SUCH LAW! IT CANNOT PROPERLY ADOPT AND SEIZE UPON THE LAW OF SOME NON-FORUM JURISDICTION AT CONFLICT WITH THE GENERAL RULE—NO MATTER HOW PERSUASIVE AND ENLIGHTENED SUCH RULE OF LAW MAY APPEAR—AND MAKE THAT THE LAW OF THE CASE IN MONTANA!

Werthan Bag Corp. -vs- Agnew, (C.A. Tenn. 1953) 202 F. (2d) 119.

In the *Werthan* case the Federal Court sitting in Arkansas had jurisdiction, as here, by virtue of the amount in controversy and diversity of citizenship. The question was whether the woman plaintiff had a cause

of action for loss of services and companionship by virtue of the defendant's having negligently injured her husband. *IF* the Federal Court had been the Supreme Court of Arkansas, or IF it had had jurisdiction or authority to announce the rule it favored, it would have adopted a rule announced by the Court of Appeals for the District of Columbia. HOWEVER, by virtue of the Rules of Decision Act and *Erie -vs- Tompkins,* supra, it was bound to seek for and apply the law of Arkansas; and in absence of expression of that law by Arkansas' highest tribunal, to ascertain and apply the rule of the weight of authority, i. e., the general rule.

> "We are much impressed by the reasoning of the Court of Appeals for the District of Columbia—and were we free to declare the law of Arkansas, whose courts have made no pronouncement on the subject, to be contrary to the overwhelming weight of state court authority, we might well go along with the Court of Appeals for the District of Columbia. BUT WE CONSIDER OURSELVES RESTRICTED IN THIS RESPECT BY THE HIGHEST AUTHORITY." (Citing *Erie -vs- Tompkins* and *West -vs- A.T.&T.*)
>
> "We think these two opinions of the Supreme Court, considered together, reveal *how strongly* the Supreme Court intended to restrict the federal courts in the pronouncement of their own views of the common law when inconsistent with the opinions of the state courts. It would seem that, in the teeth of such intended curtailment, this court would not be privileged to declare the law of Arkansas *to be contrary to the universal law* applied in other states whose courts have spoken upon the subject." (Emphasis supplied.)
>
> *Werthan Bag Corp. -vs- Agnew,* (C.A. Tenn. 1953) 202 F. (2d) 119, 124, 125.

And the rule of the *Werthan* case would be even more pointed where, as here, (and as outlined on pages 43 to 50, post) the rule which the trial court seized upon and made the "law of the case" represents one side of a split of District Court authority in California as followed by a Supreme Court of Oklahoma case! The other line of California cases represented by *Vaughn -vs- Montgomery Ward & Co.,* 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950) is expressive of the general rule and would never sustain the plaintiff's proofs in this case!

CONCLUSION AS TO FIRST SPECIFICATION OF ERROR

By virtue of the foregoing law and irrespective of what the parties did or did not do, the Federal Court had no jurisdiction or authority on substantive issues of standard of care and proof of breach, i. e., proof of a prima facie case to seek for and apply any law other than the substantive law of Montana as supplemented, where absent, by the weight of authority in other states; and it was error for the Court to seize upon the decisions of two non-Montana jurisdictions representing the minority rule and declare such decisions to be the "law of the case" in direct violation of the *Erie -vs- Tompkins* mandate!

Specification of Error II

After the Law of the Case Had Been Determined By the Adoption and Giving Without Objection of the Instructions Which Expressed, as They Had to Under the Rules of Decision Act and *Erie -vs- Tompkins*, the Substantive Law of Montana as Supplemented, Where Silent, By the Weight of Case-Law Authority Across the Nation, the Trial Court Erred in Then Abandoning Such Substantive Montana and General Law and Seizing Upon a Narrow Line of Minority Rule Cases as the Basic Standard Against Which to Weigh Defendant's Challenge That There Had Been No Proof of Breach of Duty and That Plaintiff Had Not Proved a Prima Facie Case.

The two instructions that the court singled out as making "apparent" (R. 13) the court's conviction that the *Nicola* line of cases had become the "Law of the Case" are as follows:

Plaintiff's Tendered Instruction No. 8 (R. 398)

> "Storekeepers are under the duty to keep the floors of their premises *reasonably safe,* as I say, for the people who are invited to pass over them. The right of a proprietor of a place of business to wax a floor which the customers are expected to use is not one which is superior to the right, or to the duty to use ordinary prudence and caution to avoid injury to those who come upon the premises. If a storekeeper has a floor waxed or polished, it must be done in such a manner that it remains *reasonably safe* for the invitee, for the people that the store owner, in this case, Safeway, invites into the store to do business." (Emphasis supplied.)

BUT THIS INSTRUCTION IS WHOLLY EXPRESSIVE OF AND CONSONANT WITH MONTANA LAW SO FAR AS THE COURTS OF THAT

STATE HAVE SPOKEN. It is merely a statement of the established Montana law on the standard of duty of care owed by a business premises operator to an invitee.

> "the Mulvaney Realty Company owed to plaintiff the legal duty to exercise reasonable care for her safety, and maintain and keep said premises and facilities in a *reasonably safe* condition." (Emphasis supplied.)
>
> "*Ahlquist -vs- Mulvaney Realty Co.,* 116 Mont. 6, 30, 152 P. (2d) 137, 148 (1944). (Plaintiff, an invitee in a bus depot slipped and fell in ladies room.)
>
> "The general rule deducible from the authorities, and of which we voice approval, is clearly stated in 20 R. C. L. p. 66, as follows: 'A merchant or shopkeeper, who maintains warerooms for the exhibition and sale of goods, impliedly solicits patronage, and one who accepts the invitation to enter is not a trespasser nor a mere licensee, but is rightfully on the premises by invitation, and entitled to all the rights of invited persons. The floors and passageways of the building must be kept in a *reasonably safe* condition, and the same is true of stairways, elevators, doors, windows, and other places and appliances. (Emphasis supplied.)
>
> *Chichas -vs- Foley Bros. Grocery Co.,* 83 Mont. 575, 581, 236 Pac. 361, 362 (1925).
>
> (Invitee in general store fell down unguarded elevator shaft.)

See also:

> *McCartan -vs- Park Butte Theater Co.,* 103 Mont. 342, 62 Pac. (2d) 338 (1936).
>
> (Patron tripped over protruding theater step.)
>
> *Rossburg -vs- Montgomery Ward & Co., et al.* 110 Mont. 154, 99 P. (2d) 979 (1940).
>
> (Invitee slipped on accumulated oil on floor.)

Myles -vs- Helena Motors, 113 Mont. 92, 121 Pac. (2d) 549 (1942).
(Invitee in garage walked into car hoist.)

Montague -vs- Hanson, 38 Mont. 376, 99 Pac. 1063 (1908).
(Store patron falls down unguarded cellarway.)

There is no question but that the instruction is the general Montana rule and was not objectionable under *Erie -vs- Tompkins* or for any other reason. There is no reason why the giving of that instruction should put any party on notice that the rule of *Erie -vs- Tompkins* was being abandoned and the court was about to adopt a narrow, minority rule as the law of the case!

That portion of the instruction which limits the proprietor's waxing rights to one that maintains a reasonably safe floor is wholly consistent with the rest of the instruction and with Montana law. It is doubtless what Montana courts would hold if called to pass on the question and represents the general rule. Certainly the defendant at no time maintained that it had the right to wax its floors irrespective of the creation of a dangerously slippery condition. Such a contention would fly in the teeth of the Montana rule, supra.

The second instruction specified by the court as having given notice of the *Nicola* line having become the law of this case picks up that same issue of standard of duty of care but carries it further into the issue of right to wax:

> "The fact that a floor is polished or slick does not of itself establish that the store owner is negligent in his choice or application of the floor dressing, or that it is dangerous to the public, or to those invited to use it. A store owner, such as Safeway

> in the present case, may treat his floors with wax and soap and water or other substance in the customary manner without incurring liability to any patron of the store unless he is negligent in the materials he uses for the treatment or the manner of applying them, OR THE CREATION OF A DANGEROUSLY SLIPPERY CONDITION, so that thereafter the floor is not reasonably safe for its intended use by the customers in the store."
>
> Defendant's Tendered Instruction 12, as Amended (R. 398, 399), with Amendment showing in capitals.

The trial court has stated in its Order denying defendant's alternative motions (R. 13) that by the giving of plaintiff's Instruction No. 8 and by the amendment of defendant's Instruction No. 12, it "became apparent" that the court was adopting the *Nicola* line of cases as the law of this case. (R. 13.)

With *or without* the amendment, the instruction correctly states the majority rule and doubtless would find approval with the Montana Supreme Court in view of that State's basic law that the premises must be *reasonably safe* for the invitees. It is not the majority rule, and defendant has never contended, that a proprietor has any right to create a dangerously slippery condition. As the instruction read before amendment, the premises had to be "reasonably safe", and they cannot be "reasonably safe" if they are dangerously slippery. If any inference were to arise from this instruction, it should be that the general rule was again being announced. For the last sentence is an almost verbatim quotation from the case of *Dixon -vs- Hart,* 344 Ill. Ap. 432, 101 NE (2d) 282, 284 (1951). There, after reviewing cases from many

jurisdictions and citing ALR annotations on the point, the court said:

> "In our view, the simple legal proposition (that) crystalizes from the many factual situations giving rise to suits of this nature may be stated thusly: A store owner may treat his floors with wax or oil or other substance in the customary manner without incurring liability unless he is shown to be negligent in the materials he uses or in the manner of applying them."

But, as the *Dixon* court hastened to point out, and as the instruction both as originally tendered and as amended provided, such right to treat the floors was subject to the basic requirement that after such treatment the floors remain reasonably safe for their intended use. The *Dixon* language on this point at page 284 of 101 NE (2d) was as follows:

> "We agree with the Supreme Court of Missouri in the last cited case that the use of an unusual amount or kind of wax on a floor which causes it to be so highly polished *as to be dangerous for use* by the public would constitute actionable negligence; *but* we hold that such dangerous condition must be shown by competent, objective evidence." (Emphasis supplied.)

But, irrespective of the fact that this instruction represented the majority view across the country (as the *Dixon* court determined from its study), and irrespective of its being wholly consonant with basic Montana law, the court ruled that by the making of an amendment which in no-wise changed the basic intendments of the instruction, the court was freed of the majority rule burdens and in a position to adopt and make as the "law of the case" a minority ruling which was attractive to the court but

wholly at odds with case law across the country.

The *true law of the case,* which was established by the giving of the instruction as amended without objection, was the majority rule; and it was error for the court to abandon it; and it was further error for the court to make no pronouncement of such abandonment so that objection could be made, but rather to regard such abandonment as apparent.

CONCLUSION AS TO SPECIFICATION OF ERROR II

Appellant respectfully submits that the two Instructions as given and amended state basic Montana law, and the law generally as applied to the more specialized issue of the standard of due care in the treatment of floors. There is certainly nothing to justify the court's statement that by the giving and amendment of the same, "it *became apparent* the Court was adopting the law announced in the cases of *Nicola*" et seq. (R. 13.) If any aberration from the *Erie -vs- Tompkins* mandate can be authorized by virtue of the giving or amendment of instructions, or otherwise, (which appellant denies in its First Specification of Error, *supra*), then it certainly should take something more concrete than the adoption of sound general rules of law to put on notice a party who is urging the applicability of the general rule so that he can object and get the rules and the record straightened out.

It was error for the court to seize the minority *Nicola* line rule as the basic standard against which to weigh defendant's challenge that there had been no proof of breach of duty and that the plaintiff had not proved a

prima facie case by competent proof of the existence of a dangerously slippery condition at the time and place of the accident; and it was not and should not have been apparent to the Appellant that such error was being committed.

Specification of Error III

The Court Erred in Not Granting Defendant's Motion for Judgment N.O.V.

A. Introduction

a) Majority Rule Defined

There has been frequent reference throughout this brief to the "majority rule" which is in conflict with the rule of the *Cagle* and *Chase* cases (R. 13), frequently referred to herein as *Nicola* et. al., and which the trial court held had become the law of this case.

The "rule" that is being referred to is one of quantum of evidence necessary to prove a prima facie case. It is the rule by which the sufficiency of the evidence is legally weighed. The trial court erroneously adopted *not* the majority rule but the strict minority rule of *Cagle* et al, (R. 13) in applying defendant's challenge for judgment n.o.v. Phrasing the problem in terms of the end result—before the *Cagle* tribunal plaintiff's judgment would probably be permitted to stand; but before the great majority of courts across this country, *it would not.*

The majority rule, as established by the numerous decisions from the various jurisdictions hereinafter cited, commencing at page 35, is that the existence of a dangerously slippery floor condition at the time and place of the accident must be proved by substantial evidence apart from the happening of the accident itself.

It will be noted as these authorities are analyzed that the presence *or absence* of a number of factors are considered in determining whether substantial evidence of the dangerously slippery condition has been adduced. As the factors accumulate, one way or the other, the courts recognize the sufficiency or insufficiency of the proof. If all that the evidence adds up to, as here and in the *Cagle* case relied upon by the court, (R. 13) is that the accident occurred and the plaintiff described the floor as very shiny, then the great majority of the courts would say that no substantial evidence of a dangerously slippery condition has been adduced and that the doctrine of res ipsa loquitur is being relied on.

In approximate order of the weight given them by the courts, the factors are:

1. Accumulation of slippery, foreign substance where accident occurred.
   a) Soiled clothing and wax scrapings on shoes showing such foreign substance.
   b) Skid or slide marks.
2. Other slips or falls in that area near that time.
3. Characterization by witness who examined the floor that it was of a particular degree of slipperiness.

Since res ipsa loquitur is not applicable according to the great weight of authorities, there is no reason in these slip and fall cases that the plaintiff should not have to prove the dangerously slippery condition of the floor at the time and place of the accident and apart from the happening of the accident itself. This is what the majority of the cases insist upon!

If the factors of proof of the particular case are sufficient from the foregoing to have established the existence of this dangerously slippery condition, then the trier of fact is entitled to consider *how* the hazardous condition was created. This is the area where legitimate inference or presumption is available to the trier of the fact. If there has been a recent oiling or waxing and it was excessive oil or wax that had been proved to have made the accident scene dangerously slippery, then the trier of fact can infer negligent application and the proprietor's notice of the condition.

But since the absolute weight of authority permits no inference of negligence (the creation of a dangerously slippery condition) from the waxing or oiling of a floor or from the accident itself, it is the duty of the courts to see that the rationalization process or inference process isn't reversed so that the jury starts first with the graphic evidence of the fall and then infers that since the floor had been waxed it must have been done so negligently so that a dangerously slippery condition was created and proximately caused the fall! In many of the following cases commencing at page 35, the jury found for the plaintiff, i. e., it impliedly found that a dangerously slippery condition had been created by the defendant proximately causing the accident. In each, the court then reviewed the facts *and law*, as represented by the great weight of authority, and held that there was not substantial proof of the existence of a dangerously slippery condition and entered judgment as a matter of such law for the defendant. These unexplained slip-and-fall cases involve temptingly simple presumption situations for the ordinary juror, and judicial supervision is particularly

essential. Furthermore, the necessity for adherence to the well established rules and legal supervision of the trier of fact is especially pertinent and necessary in a case such as this where the plaintiff urged the applicability of res ipsa loquitur in her own case in chief in order to raise a jury question. (R. 182, 183, 191.) Under the overwhelming majority of the courts, and before this trial court if it had not erroneously adopted the *Cagle* rule as the law of the case, the plaintiff's proof here would have been found wholly wanting.

b) Factors of Evidence as to Dangerously Slippery Condition Wholly Absent Here

The complete absence of any evidence of a dangerously slippery floor condition in this case is strikingly apparent from the following:

1. No proof of any foreign or slippery substance on the floor.
2. No proof that the floor surface was slippery, but on the contrary, positive testimony by each of the four witnesses who inspected the floor that it was not slippery. (R. 309, 210, 246, 230.)
3. No other persons slipped or slid in the area although the plaintiff was helped to her feet and the employees who had assisted her remained there for about five minutes. (R. 309.)
4. No customers of the 550-odd that were in the store that day slipped or had any difficulty. (R. 206, 211.)
5. Plaintiff herself didn't describe the floor as slippery—nor did any other person.
6. No slip or slide or skid marks were on the floor indicating slippery foreign substance. (R. 309, 211, 230.)
7. Clothing not stained or soiled. (R. 82.)

The only description which the plaintiff gave of the floor was that it was "very shiny". This, of course, is no evidence of the existence of a dangerously slippery condition.

Stephens -vs- Sears Roebuck & Co., (CA Ind. 1954) 212 F. (2d) 260, 261;

Vinson -vs- Brown, 193 Ore. 113, 237 P. (2d) 501 (1951);

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282, 1951);

Rogers -vs- Collier, (Tex. 1949) 223 S.W. (2d) 560;

Osborn -vs- Klaber Bros., 227 Iowa 105, 287 N.W. 252 (1939).

Not only were the standard factors as to evidence of a dangerously slippery condition absent, but on each potential point there was concrete evidence to the contrary. As the cases, commencing hereinafter at page 35, show, there was a complete and total failure of proof of the existence of any dangerously slippery condition at the time and place Miss Murphy fell!

c) Court Permitted Inference of Existence of Dangerously Slippery Condition from Proof of Waxing and from the Happening of Accident Itself.

Controlled by the *Cagle* case reasoning (R. 13), which is shown hereinafter in this brief at page 45 to be faulty and erroneous and not representative of the majority rule, the trial court failed in its review of the testimony on defendant's motion for judgment n.o.v. (R. 14-17), to require substantial proof of the existence of a dangerously slippery floor condition and acquiesced in the jury's

inference of the existence of such a condition from the proof of the waxing of the floors and the proof of the accident.

> "Whether a particular inference can be drawn from certain evidence is a question of law, but whether the inference shall be drawn is a question of fact for the jury."
>
> *Blank -vs- Coffin,* 20 Cal. (2d) 457, 461, 126 P. (2d) 868, 870 (1942).

C-1

Build-up of Wax (R. 14)

There is not a single shred of evidence anywhere in the record that any wax whatsoever had built up anywhere in the store when Miss Murphy fell, and more particularly that any had built up at the time and place of her fall! There is not a single shred of evidence that any wax build-up, about which the witnesses were talking, had *ever* resulted in a dangerously slippery condition. There is no evidence that any de-waxing operation was then, at the time of the accident, due or over due. All that the record discloses is that from time to time in the care of the floors there had been some de-waxing (R. 175, 331). And from this the trial court permitted an inference by the jury of the proof of a dangerously slippery condition at the time and place of the accident!

If any logical process whatsoever would permit such a conclusion, and it will not, it certainly would be rebutted by the *proof* that under the workmanship of this mature (R. 320) janitor not only had the floors *not* been negligently maintained but the store had experienced three slip-and-fall cases in 1,050,000 *sales,* and, of these,

only Miss Murphy claimed the accident was Safeway's fault! (R. 185, 184.)

Furthermore, she did not fall in some unusual spot in the store where traffic was light. She fell about mid-aisle in a heavily traveled portion (R. 186) of the store. Mrs. Ledingham, who saw Miss Murphy a fraction of a second after she hit the floor (R. 306), referred to defendant's Picture Exhibit 10 and put Miss Murphy's body on the grease-pencil-arrow with her head at about circled 2. The other witnesses who saw her immediately after the fall place her at about the same place. Referring to defendant's Picture Exhibit D9, and pages 228 and 238 of the record, witness Squires placed her in approximately the same spot. The plaintiff herself testifies she was at the end of the produce counter shown in the pictures (R. 37) on her way to the coffee counter.

The court was permitting an inference of negligence from proof of the mere waxing of the floor and irrespective of the foregoing total absence of proof of any wax accumulation or the creation in some other manner of a dangerously slippery condition. That is not the law!

> "some condition beyond the fact that the floor was waxed and that the plaintiff fell is necessary to a cause of action for negligence in creating or permitting a dangerous condition to exist where people are expected to walk."
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785, 786 (1955).

> "Neither the fact that plaintiff slipped and fell nor the fact that the floor was waxed, of itself, establishes or permits an inference of negligence."
>
> *Hanson -vs- Lincoln First Federal Savings & Loan Association,* 45 Wash. (2d) 577, 277 P. (2d) 344, 345 (1954).

See also: *Stephens -vs- Sears Roebuck & Co.*, (CA Ind. 1954) 212 F. (2d) 260.

In the total absence of proof that any wax whatsoever had built up at the accident scene, or that it had ever built up in the store so as to create a dangerously slippery condition, there was no room for any inference whatsoever under Montana law as to a built-up wax condition.

> "From one fact found another may be presumed if the presumption is a logical result; but to hold that a fact presumed (that the floors had been allowed to accumulate wax to the point of being dangerously slippery) at once becomes an established fact for the purpose of serving as a basis for a further presumption of inference (that there *was* a dangerous accumulation in the middle of the aisle at the time and place where plaintiff fell) would be to spin out the chain of presumptions into the barest region of conjecture."

Doran -vs- United States Bldg. etc. Assn., 94 Mont. 73, 78, 20 P. (2d) 835, 837 (1933). Sec. 93-1301-4 R.C.M. (1947).

C-2

Method of Waxing (R. 14)

At the same page of the court's opinion (R. 14), it is stated that the jury could have found negligence in the manner of the application of the wax.

Again it is an example of reasoning *from* and inferring negligence *from* the happening of the accident and the waxing. Properly the court should have studied the evidence for proof of the existence of the dangerously slippery condition. If that was found as a proven fact, then it could review the evidence as to how the waxing was

done and permit the inference—if the jury decided to make it—that such dangerously slippery condition had been created by defendant's method of waxing.

But here the court is approving the following jury rationale and in the face of the undisputed remarkable record achieved by this particular method of floor care whereby over a period of years and the attendance at the store of over a million customers only the plaintiff slipped and fell and blamed Safeway! (R. 185.)

a) Janitor Rodoni's method is negligent.
b) At the time and place in question on June 24, 1958 that negligent system created a dangerously slippery condition (irrespective of absolute proof to the contrary.)
c) Such dangerously slippery condition was the proximate cause of Miss Murphy's fall.

That is spinning out the inferences in violation of the *Doran* rule and section 93-1301-4, R.C.M. (1947) and is the very thing that the courts must guard against in unexplained slip and fall cases:

> "*The majority of courts* in the United States hold that the mere application of wax to a floor will not constitute negligence, even though having some tendency to make the floor more slippery. (Citations) *To hold otherwise,* these courts reason, *is to permit the jury to act upon speculation and conjecture* that he slipped on a floor which he deemed to have been made excessively slippery by defendant's application of wax." (Emphasis supplied.)
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

Furthermore, for the foregoing inference sequence to have any merit, janitor Rodoni would have been creating

a dangerously slippery condition over the whole floor twice each week. For he always did the same work, i. e., the same operation (R. 328). Of course that is fantastic under this record of remarkably safe results!

C-3

Change in Number of Weekly Cleanings (R. 14, 15)

On page 15 of the record the court states in its opinion that the jury could properly find that there had been a build-up of excess wax to the point of creating a dangerously slippery floor condition at the time and place of Miss Murphy's fall from the fact that six months after the accident Mr. Rodoni commenced waxing the entire floor once a week and then on the second night of clean-up, just waxing the fore-part of the store where the traffic was necessarily heaviest.

In the first place, this isn't actually what Mr. Rodoni said he did. He testified that before June of 1958, he sometimes did and sometimes didn't wax the whole store twice a week—depending on the shape the floor was in. (R. 333.) But even if the facts had been as the court recalled them, there is no rational process approved by law that can be gone through which will result in substantial evidence on the issue as to whether a dangerously slippery condition existed at the time and place of the accident. There isn't even any evidence as to why the change was made, unless it was that the difficult economic situation which had developed (R. 79, 80) had resulted in a fall-off of sales and traffic. But in the absence of an iota of evidence that the change was made

in December, 1958, because excessive wax was building up, the court permitted that basic presumption to be made. And from that premise the court permitted the further inferences that such building up of excess wax was also in process in June, 1958; that it had resulted in the build-up of a *dangerously slippery amount* at the time and place of the accident; and finally that that was what caused the plaintiff to slip and fall.

If there had been evidence (which there wasn't) that the change was made because in December, 1958, two complete waxings per week was resulting in a dangerous build-up, still Montana law would not permit the inference sequence. It would not permit the inference by the trier of fact that such build-up situation also obtained back in June of 1958:

> "No presumption is to be inferred from the fact that a condition exists at a particular time that it existed in the past. Presumptions (that a thing proven to exist continues to exist) cannot be reversed. They do not operate backwards." (Parenthetical phrase added.)
>
> *Doran -vs- United States Bldg. etc. Ass'n.*, 94 Mont. 73, 76, 77, 20 P. (2d) 835, 837 (1933).

The trial court even stated in its opinion (R. 15) that by virtue of the argument made by plaintiff's counsel to the jury that the change of mode of operations had arisen six months after the accident *because* of defendant's "discovery" of its own negligence, the jury could consider that *as evidence* that the change did come about to correct a dangerous procedure. Plaintiff's argument was not a whit stronger than the totally blank record, summarized above, upon which it had to be based and was not itself

any evidence whatsoever of any negligent act or omission! OF COURSE, THROUGHOUT THE COURT'S REVIEW OF THE EVIDENCE UNDER DEFENDANT'S CHALLENGE BY WAY OF MOTION FOR JUDGMENT, N.O.V., THE COURT WAS REQUIRED TO REJECT ALL BUT "SUBSTANTIAL EVIDENCE" OF PROOF OF THE EXISTENCE OF A DANGEROUSLY SLIPPERY CONDITION AT THE TIME OF THE ACCIDENT.

2 Barron & Holtzoff 759, sec. 1075.

Also, it should be noted that throughout these ramified inference sequences it was necessary for the court and jury to disregard the undisputed, credible evidence of the four witnesses who hurried to help Miss Murphy and who then and there made an inspection of the floor and found that it was not slippery! It is not the law to ignore such proof.

> "The rule that the trial court may not disregard uncontroverted credible evidence is fundamental. (Citations.)"
>
> *Higby -vs- Hooper*, 124 Mont. 331, 352, 221 P. (2d) 1043, 1053 (1950).

> "We have repeatedly held that uncontradicted credible evidence may not be disregarded."
>
> *Burns-vs- Fisher*, 132 Mont. 26, 34, 313 P. (2d) 1044, 1049 (1957).

C-4

Manner of Fall (R. 16-17)

The court at page 16 of the opinion refers to the manner of the plaintiff's fall and the case of *Allen -vs- Matson Navigation Company*, (CA Cal. 1958) 255 F. (2d) 273.

Neither the trial court in the instant case nor the Court of Appeals in the *Allen* case held that from the manner of fall the existence of a dangerously slippery condition could be inferred. The manner of the fall is indicative that it was a slipping fall rather, for example, than a tripping fall. Of course, it should also be kept in mind that in the *Allen* case there was other substantial evidence of the existence of a dangerously slippery condition, violative of the carrier's duty to use *the utmost care and diligence* for the safe carriage of the passengers. And the difference in standard of care is of fundamental importance.

Osborn -vs- Klaber Bros., 227 Iowa 105, 287 N.W. 252, 253 (1939).

III-B

Cases Illustrating the General Rule

It is the defendant's contention that under the rules of the weight of authority the plaintiff had the burden of proving the existence of a dangerously slippery condition at the time and place of the accident by substantial evidence and aside and apart from the happening of the accident itself and the prior waxing of the floor.

The following cases are authorities for this contention.

In the case of *Dixon -vs- Hart,* 344 Ill. App. 432, 101 N.E. (2d) 282 (1951), upon which defendant's instruction No. 12 (R. 13) was based (this brief supra at page 21) the plaintiff slipped and fell and obtained a jury's verdict and judgment. Defendant's motions for directed verdict and judgment n.o.v. were denied, but on appeal judgment was entered for it. Plaintiff alleged a

dangerously slippery floor condition and set out to prove it. Her fall occurred when her left foot slipped. She inspected the floor by rubbing her hand on it at the place where she was then taken and seated, about 25-30 feet from the site of the fall, and found it "slick". The floor had been waxed three or four weeks before the accident. She noted a dark mark about 1½ feet long where she had fallen and where her foot slipped. The court reviewed the law and held that waxing a floor isn't evidence of negligence, and that a dangerously slippery condition "as shown by competent objective evidence must be shown", and concluded:

> "Nor can we agree with the plaintiff's contention that the mere showing that a floor has been polished together with some evidence of its being 'slick' is at least sufficient to require that the store-owners' liability be weighed by a jury in any case. It is difficult to see how the ends of justice would be served by permitting a jury to speculate and conjecture as to whether the condition of the floor, as shown by such evidence, caused plaintiff to fall. This is especially true in the instant case where a jury's conclusion as to the condition of the floor where plaintiff fell would, of necessity, be based on an unwarranted inference from evidence as to the condition of the defendant's floor '25 or 30 feet' away. Extrinsic evidence of a character more clear and convincing than plaintiff's completely subjective verbal characterization of the floor as 'slick' must be shown before a jury could fairly and intelligently weigh the owner's conduct in the care of his floors and its causal relationship to plaintiff's fall. (Emphasis supplied.)
>
> "We conclude that the plaintiff has not, as a matter of law, on the evidence adduced, established a cause of action—"

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282, 283 (1951).

In the case of *Stephens -vs- Sears Roebuck & Co.,* (CA Ind. 1954), 212 F. (2d) 260, the plaintiff fell on a floor that she described as "very slick and shiny". She described her fall as "suddenly I seemed to hit a greasy or slick spot, my feet flew out from under me, and I hit the floor". Plaintiff had a verdict and defendant moved under the federal rules for judgment n.o.v., which was granted and affirmed.

> "It was incumbent on plaintiffs to prove that the defendant was guilty of negligence in maintaining the washroom floor. Counsel for plaintiffs admits that waxing a floor is not negligence *per se.* If the evidence of plaintiffs' witnesses standing alone, is to be considered as sufficient to prove that the floor was waxed, it was still incumbent upon the plaintiffs to prove that the waxing was done negligently *resulting in a dangerous condition.* THERE IS NO DIRECT EVIDENCE THAT THERE WAS A DANGEROUS CONDITION. THE MERE FACT THAT MRS. STEPHENS FELL DOES NOT SO PROVE. Her testimony that she *seemed* to hit a greasy or slick spot, with no description by her or anyone else as to the appearance of the alleged spot, falls far short of evidence that there was a greasy or slick spot. The testimony of plaintiffs' witnesses that the floor was 'slick', 'shiny' or 'slippery' fails to definitely show a dangerous condition. These words of description are lacking in precision of meaning. What is 'slippery' to one person might not be 'slippery' to others. The same characteristic applies to 'shiny' and 'slick'. (Emphasis supplied.)
>
> "There is no evidence in this case that the defendant was negligent in maintaining the floor *or that there was a dangerous condition existing on the floor of the washroom where Mrs. Stephens fell.* (Emphasis supplied.)
>
> *Stephens -vs- Sears Roebuck & Co.,* (CA Ind. 1954) 212 F. (2d) 260, 261 .

In the case of *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955), the plaintiff fell on a floor that she alleged had been so excessively waxed as to be dangerous. The floor was described in the evidence as slippery and it was shown to have been recently waxed.

> "On appeal, plaintiff contends that the mere proof that a floor is slippery creates a jury question as to whether *any application* of wax to a floor is negligence. She cites to us a number of decisions from California, which, although most of them offer further evidence of negligence than appears in this case, apparently regard evidence of slipperiness as the basis for a determination of fact as to whether or not the floor was so slippery as to constitute a breach of the duty which defendant owed his invitees. (Citing *Nicola* et al.) These cases, however, recognize that slipperiness is a relative term and that the fact that a floor is slippery does not necessarily mean that it is dangerous to walk upon.
>
> The majority of courts in the United States hold that the mere application of wax to a floor will not constitute negligence, even though having some tendency to make the floor more slippery. (Citations.) To hold otherwise, these courts reason, is to permit the jury to act upon speculation and conjecture upon the plaintiff's testimony that he slipped on a floor which he deemed to have been made excessively slippery by defendant's application of wax. (Citation.)
>
> *Therefore, some condition beyond the fact that the floor was waxed and that the plaintiff fell is necessary to a cause of action for negligence in creating or permitting a dangerous condition to exist where people are expected to walk.* The proof in this case does not meet this test and the trial court did not err in refusing its submission to the jury. (Emphasis supplied.)
>
> *Gaddis -vs- Ladies Literary Club,* 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

In *Vinson -vs- Brown,* 193 Ore. 113, 237 P. (2d) 501 (1951), the plaintiff fell on a floor that had been washed, waxed and polished the previous business day. She specified excessive wax as the cause of the dangerously slippery condition. She walked into the store ten or twelve feet and "all at once I just whirled around and went down." She described the floor as clean, shiny and slippery. The court noted that plaintiff's clothing was not soiled and there were no skid marks at the scene of the fall. There was no evidence of other falls or complaints of a slippery condition. After so summarizing the evidence, the court said:

> "The question now presents itself: Do the facts summarized above support a finding that the defendant's floor was in a negligent condition at the time of the plaintiff's fall?"
> 237 P. (2d) 502.

Impliedly the court ruled our res ipsa loquitur and specifically it gave consideration as to whether the proof of the recent waxing gave rise to any presumptions of inferences of negligence and concluded that it did not. Judgment n.o.v. was ordered entered for the defendant.

In *Hanson -vs- Lincoln First Federal Savings & Loan Association,* 45 Wash. (2d) 577, 277 P. (2d) 344 (1954), the plaintiff entered the lobby of the defendant's premises and proceeded a distance on a rubber mat. She then stepped off the mat to go to a customer's counter and slipped on the asphalt-tile floor adjacent to the mat which had been waxed eight days previously. The court noted that the law required the defendant to maintain the floor

reasonably safe for its patrons. It then searched the record for some proof of a dangerously slippery condition and concluded:

> "Neither the fact that plaintiff slipped and fell nor the fact that the floor was waxed, of itself, establishes or permits an inference of negligence. (Citation) —"
>
> "No fact is shown which would support a finding that the floor was so smooth that it actually was dangerous. (Citation) —"
>
> "We are unwilling to agree with plaintiff's contention that substandard conduct can be established by combining and totaling acts which meet reasonable standards."
>
> 277 P. (2d) 345.

The judgment sustaining a demurrer to the evidence was affirmed.

In *Bowser -vs- J. C. Penney Co.*, 354 Pa .1, 46 A(2d) 324 (1946), the plaintiff was nonsuited and appealed. The plaintiff fell while walking in an aisle which had been waxed the previous evening. Also, there was some evidence of an accumulation of wax in one spot, but to see it one had to stop and look "right down at it". The court held that the proprietor was not an insurer and observed as to the plaintiff's burden of proof:

> "We have held that it is not negligence per se on the part of an owner to wax or oil his floors: (Citation.) The fact that a person falls on a recently waxed floor does not of itself justify a finding of negligence on the part of the owner; (citation). But, if the floor is improperly waxed *thus creating a dangerous condition*, the question of negligence of the owner is for the jury: (Citations). However, the

trial judge should not permit an issue of fact to be presented to the jury, where the evidence is such that upon full belief and drawing of all proper inferences, reasonable men could not reach the conclusion there was negligence. Plaintiffs rest their claim of negligence on the ground that there existed a spot of wax on the store floor which caused Mrs. Bowser to fall and since this condition existed the proper inference to draw was that the wax was improperly applied. The real question is not whether there was an improper application BUT WHETHER SUCH ALLEGED IMPROPER APPLICATION CREATED A CONDITION so obviously dangerous to amount to evidence from which an inference of negligence would arise." (Emphasis supplied.) (Nonsuit was affirmed.)

In *Osborn -vs- Klaber Bros., 227* Iowa 105, 287 NW 252 (1939), the plaintiff fell on a "tile-tex" floor that had been waxed with liquid wax three days previously. She obtained a verdict and judgment and the defendant appealed. Her case was based upon her allegation that excess wax had created a dangerously slippery condition. She described her fall as "my foot went out from under me like that and I went down". She described the floor as "slippery and slick" and had some "shiny variation" to it.

"Though it was a most regretable accident, it appears to us that the evidence was so inadequate that the question whether defendants caused the floor to be excessively waxed should not have been submitted. Under the record an answer to this question would have been so conjectural that it would be outside a jury's proper functioning to pursue the query."

(Judgment was reversed.)

To the same effect are:

Vaughn -vs- Montgomery Ward & Co., 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950);

Thoni -vs- Bancroft Dairy Co., 255 Wis. 577, 39 N.W. (2d) 690 (1949);

Shumaker -vs- Charada Inv. Co., 183 Wash. 521, 49 P. (2d) 44 (1935).

III-B—(a)

MINORITY RULE OF *NICOLA* DISTINGUISHED

The foregoing cases represent the majority rule across the country under facts substantially similar to those involved here. They illustrate the direct application of the law announced in plaintiff's Instruction 8 and defendant's instruction 12 to the effect that under Montana law the proprietor must maintain his premises reasonably safe but he can wax or otherwise treat the floors *so long as* they remain reasonably safe for their intended use. These are the cases behind the true law of the case which the court should have followed and applied!

It should be noted that the defendant has not contended that the majority rule (which is the rule Montana would adopt) is that which obtains in a number of jurisdictions to the effect that if a proprietor uses ordinary care in the selection and application of his floor dressing, he cannot be held liable *irrespective* of his having created what could reasonably be considered to be a dangerously slippery floor condition at the time and place of the accident. Such rule, illustrated by the following cases, is probably as far in favor of no liability in slip and fall cases as

the *Nicola* line is in favor of res ipsa loquitur; and Montana by virtue of her basic case law in the "falls-in-stores-field" (this brief at page 18) would follow neither one.

J. C. Penney -vs- Kellermeyer, 107 Ind. App. 253, 19 NE(2d) 882 (1939);

Dunham -vs- Hubert W. White, Inc., 203 Minn. 82, 279 NW 839 (1938);

Linders -vs- Bildner, 129 NJL 246, 29 A.(2d) 182 (1942);

Peterson -vs- Empire Clothing Co., 293 Mass. 447, 200 NE 399 (1936);

Overby -vs- Union Laundry Co., 28 NJ Super. 100, 100 A(2d) 205 (1953);

Iorio -vs- Rockland Light & Power Co., 274 App. Div. 791, 79 NYS(2d) 217 (1948);

Tenbrink -vs- F. W. Woolworth Co., (RI, 1931) 153 A. 245;

This brings appellant to a consideration of the *Nicola* case (R. 13).

Nicola Decision

In the case of *Nicola -vs- Pacific Gas & Electric Co.,* 50 Cal. App. (2d) 612, 123 P. (2d) 529 (1942), the court did not have to depart from the general rule that if a dangerously slippery floor condition is proved to exist at the time and place of the accident, it is then proper for a jury to inquire further as to what, if anything, the treatment of the floors had to do with such condition. Also, that court did not have to abandon that same general majority rule in rejecting that line of cases, supra, urged by the *Nicola* defense that a proprietor is *not* responsible for a floor that is proved *not to be reason-*

ably safe at the time and place of the accident *unless* he is also proved to have been negligent in the floor dressing which he selected or the manner in which it was applied. And this appellant has no quarrel with the actual holding of *Nicola* that a case sufficient to go to the jury had there been proven and that the line of cases absolving a proprietor of responsibility for a dangerously slippery floor condition if the plaintiff also doesn't prove negligence in the selection and application of wax was the law of California or of the majority of the states. BUT APPELLANT MOST SERIOUSLY QUARRELS WITH THE PROPOSITION FOR WHICH *NICOLA* IS CITED BY THIS TRIAL COURT AND AS APPLIED IN THE *CAGLE* CASE ALSO RELIED UPON (R. 13) TO THE EFFECT THAT IRRESPECTIVE OF A PLAINTIFF'S *NOT HAVING PROVED* A DANGEROUSLY SLIPPERY FLOOR CONDITION AT THE TIME AND PLACE OF THE ACCIDENT BY COMPETENT EVIDENCE, THE CASE CAN NEVERTHELESS BE SUBMITTED TO A JURY FOR IT TO SPECULATE, WITH THE PROOF OF THE PARTICULAR ACCIDENT BEFORE IT, AS TO WHETHER THAT PARTICULAR FLOOR SHOULD *EVER* BE WAXED, AND THEN PREDICATE NEGLIGENCE AND LIABILITY ON THE POSSIBLE OUTCOME OF SUCH SPECULATION!

That is what was done in the instant case. That is what the *Cagle* case approves. That is what the *Nicola* doctrine is supposed to stand for, AND THAT IS NOT THE LAW!

In *Cagle -vs- Bakersfield Medical Group,* 110 Cal. Ap. (2d) 77, 241 P. (2d) 1013 (1952), the Dsitrict Court of Appeals for the Fourth District Court of California had this to say of the *Nicola* language:

> "From the decision in that case it might be held that under proper circumstances, considering the type of floor and the type of patrons using the floor, *a jury might well find the application of any wax at all might be a violation of the duty to use ordinary prudence and caution to avoid injury."* (Emphasis supplied.)
>
> 241 P. (2d) 1015.

Thus the *Cagle* court pushes the pendulum to the opposite side of the stroke from the equally erroneous (under Montana law) cases (page 43, supra) which also ignore the necessity of making absolutely fundamental the proof of whether the floor at the time of the accident was or was not reasonably safe. Both extremes are erroneous under Montana law and the majority rule.

And the *Cagle* analysis was no idle commentary. For in that case, which is factually very similar to this one, the plaintiff fell on the marbleized tile floor which was described as "very highly polished, slick looking". Both feet went out from under her and she went backwards. Her husband said the floor "looked" slick and shiny. Neither he nor the plaintiff examined it. There was, of course, no proof as in this case that the floor was *not* slippery. The defendant didn't challenge the quantum of proof on the issue of the existence of a dangerously slippery condition but rather went on the other minority rule, cited above at page 43 and rejected in *Nicola,* that if it did everything "according to the book" in its treat-

ment of its floors, it shouldn't be held liable even if a dangerously slippery floor condition resulted. And if there were competent proof (not shown in the opinion) of the existence of such a dangerously slippery condition, the opinion would not be open to challenge; however, by virtue of the analysis made therein of the *Nicola* case and the rejection of the *Vaughn* case (*Vaughn -vs- Montgomery Ward & Co.*, 95 Cal. App. (2d) 553, 213 P. (2d) 417 (1950) which announces the general rule and directly conflicted with the *Nicola* dictum, and the court's continued use of the standard "slippery" rather than *"dangerously slippery"*, it clearly appears that the court approved the process of allowing the jury to speculate as to whether that particular floor should ever be waxed and base liability on such speculation, irrespective of an absence of competent proof that the floor was *dangerously slippery* at the time of the accident.

The annotator in 63 A.L.R. (2d), "Slippery Floor—Injury", 634, Section 9, has picked up and commented on this same *Nicola* dictum which *Cagle* seized when he noted:

> "And a California court has ruled that evidence that a floor within business premises has been rendered slippery by the application of wax is sufficient to support a finding of negligence. (Citing Nicola.) IT MAY BE COMMENTED THAT THIS RULING SEEMS NECESSARILY THE EQUIVALENT OF A RULING THAT PROOF OF WAXING IS EVIDENCE OF NEGLIGENCE, SINCE *SOME DEGREE* OF SLIPPERINESS OF THE SURFACE WAXED WOULD APPEAR TO BE AN INEVITABLE RESULT OF THE WAXING." (Emphasis supplied.)

See also *Gaddis -vs- Ladies Literary Club*, 4 Utah (2d) 121, 288 P. (2d) 785 (1955).

It is not the law of the majority of the courts (Section III-B, supra, page 35) that a plaintiff can pull himself up by his boot straps to a prima facie case in these unexplained, slip-and-fall cases by first proving the fall; then proving a recent waxing and then insist that a jury question has been created so that in the jury's hands it can be inferred (from the fall) that this particular floor *never* should be waxed and that therefore the defendant was negligent and is responsible for the otherwise unexplained fall. When a court will permit it, as here, the burden of *proving* a *dangerously slippery condition* at the time and place of the accident is neatly finessed!

Dixon -vs- Hart, 344 Ill. App. 432, 101 N.E. (2d) 282 (1951).

The other two cases cited by the court with *Nicola* and *Cagle* (R. 13), namely, *Baker -vs- Mannings, Inc.,* 122 C.A. (2d) Cal. 390, 265 P. (2d) 96, (1953), and *Chase -vs- Parry,* (Okl. 1958) 326 P. (2d) 809, are readily distinguishable on their facts from the instant case and therefore might not actually espouse the boot-strap doctrine described above; however, since the proof of the dangerously slippery condition is weak in each (although there at least is some, as distinguished from this case), and each appears to approve of the *Nicola* dictum and the *Cagle* interpretation, it is apparent why the trial court in this case cited them along with *Cagle* and the *Nicola* dictum which it erroneously adopted as the "law of the case". As such, they conflict with the majority rule.

It is apparent that this boot-strap theory of proof is tantamount to holding res ipsa loquitur applicable; and

that is precisely what developed after *Cagle* in California's Fourth District Court where it originated. *Cagle* was decided there in 1952. Thereafter in 1954 the same court with the same judges on the bench decided *Scribner -vs- Bertmann*, 129 CA (2d) 204, 276 P. (2d) 697 (1954). That was a slip-and-fall case where the plaintiff fell on a bakery floor which had been waxed the day before. Plaintiff was wearing "Cuban" heels, 2 to 2½ inches high. Plaintiff's daughter testified as to skid marks in the wax 10 to 12 inches long. She also described the floor as highly polished. She entered the store at about 10:00 A. M. on Monday, following the store's having been waxed the day previous. It was one of plaintiff's main contentions:

> "that since it was undisputed that the floor had been waxed the day before the accident and that plaintiff, an invitee, slipped thereon, an inference of negligence arose upon the part of the invitor." (Citing Nicola and Cagle and cases involving res ipsa loquitur.)

The court ruled that res ipsa loquitur was not applicable and construed *Cagle* and *Nicola* as having involved proof of a *dangerously slippery* floor. However, the actual *Cagle* opinion does not support that analysis:

> "In this case there is no such evidence of previous accidents but there is proof of the existence of the highly polished AND POSSIBLE SLIPPERY CONDITION of the floor for a period of at least six weeks, and such evidence might support an inference of notice or at least be sufficient to place the question of notice in the hands of the jury." (Emphasis supplied.)

"If we assume the existence of the facts and inferences most favorable to the plaintiff, we must conclude that the jury believed that the plaintiff, while walking in an ordinary and prudent manner, slipped and fell on a highly polished SLICK AND SLIPPERY FLOOR WHICH HAD BEEN MAINTAINED IN A SLIPPERY CONDITION BY THE DEFENDANTS over a period of several weeks by the application of an excessive amount of wax to the floor. There being substantial evidence of these facts in the record, the question was for the jury alone to decide whether defendants were negligent and whether or not defendants had notice of such condition." (Emphasis supplied.)

Cagle -vs- Bakersfield Medical Group, 110 C.A. (2d) 77, 241 P. (2d) 1013, 1016 (1952).

Nowhere in this *Cagle* opinion does the court say that a *dangerously* slippery condition had been proved or had to be proved to make out a prima facie case. It would seem in the Fourth District, at least, in California that *Cagle* and the *Nicola* dictum have been repudiated. The *Scribner* court also cited the middle of the road, majority rule case of *Vaughn -vs- Montgomery Ward & Co.,* 95 Cal. App. (2d) 553, 556, 213 P. (2d) 417, in direct opposition to plaintiff's contentions and which it was loath to do in *Cagle*; so it would appear that whatever weight the *Nicola* dictum as construed and applied in *Cagle* had in California as a district court decision has been nullified by the later *Scribner* holding in favor of the strictly majority rule of *Vaughn.*

The *Vaughn* case wholly subscribes to the proposition that the plaintiff *must prove* the existence of a dangerously slippery condition and that it is not enough to show

a fall and recent waxing to raise a jury question of negligence:

> "The plaintiff was a business guest of defendant. To her the defendant owed a duty of exercising reasonable and ordinary care to keep the premises in a reasonably safe condition. But the owner of a place of business is not an insurer of the safety of his invitees. In order to impose liability on the owner IT MUST BE *SHOWN* THAT A DANGEROUS CONDITION EXISTED, and that the defendant knew or should have known of it. While under some circumstances negligence may be inferred from the existence of a dangerous condition, THE BURDEN RESTS UPON THE PLAINTIFF TO SHOW THE EXISTENCE OF A DANGEROUS CONDITION, AND THAT THE DEFENDANT KNEW OR SHOULD HAVE KNOWN OF IT. No inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases." (Emphasis supplied.)
>
> 213 P. (2d) 419

DEFENDANT RESPECTFULLY SUBMITS THAT THE *NICOLA* DICTUM AND THE *CAGLE* CONSTRUCTION AND APPLICATION OF THE SAME ARE NOT REPRESENTATIVE OF CALIFORNIA LAW AT THIS TIME AND THAT UNDER THE LAW OF THE LEADING CASE OF *VAUGHN -vs- MONTGOMERY WARD,* SUPRA, THE PLAINTIFF MUST PROVE BY COMPETENT EVIDENCE THE EXISTENCE OF A DANGEROUSLY SLIPPERY FLOOR CONDITION APART FROM THE FALL ITSELF AND THAT IF NO SUCH CONDITION IS PROVED, A PRIMA FACIE CASE HAS NOT BEEN PROVED!

"Competent Evidence"

The majority rule cases (supra at pages 35 to 42) and the California case of *Vaughn* require that the plaintiff prove by competent evidence apart from the fall itself, that the floor in question was dangerously slippery. Thus, in this case, if one excludes from one's mind the happening of the accident and focuses on plaintiff's "proof" here of a dangerously slippery condition, what does one see? There is NOT A SINGLE SHRED OF EVIDENCE AS TO THE EXISTENCE OF A DANGEROUSLY SLIPPERY CONDITION OTHER THAN PLAINTIFF'S CHARACTERIZATION OF THE FLOOR AS "SHINY" AND "SHINIER THAN I HAD EVER SEEN". At page 27, supra, are a string of authorities that such characterization is no evidence at all of the existence of a dangerously slippery condition.

CONCLUSION AS TO DEFENDANT'S THIRD SPECIFICATION OF ERROR

Defendant respectfully submits to this Court of Appeals that the trial court erred in seizing on the *Nicola* dictum as applied in the cases of *Cagle* et al. (R. 13) as the law of this case. The law upon which the instructions were and had to be founded was Montana law as supplemented by the general rule.

The general rule requires as in any other non, res ipsa loquitur cases, that if the plaintiff alleges the existence, as here, of a dangerously slippery condition, she must prove it by a preponderance of the evidence and wholly apart from the happening of the accident in question.

Nicola and *Cagle* do not so hold. They say that if it is shown that a person falls on a recently waxed floor, it then becomes a jury question to determine if that particular floor should ever have been waxed with the concomitant power to predicate possible liability upon the outcome of that speculation.

The *Nicola* language which impressed this court and the *Cagle* tribunal prior to the *Scribner* case was dictum. The *Cagle* case was a California District Court decision which has since been discredited by the *Scribner* holding. It certainly was error for this Montana court in this diversity case to abandon general, majority-rule principles of proof and seize on *Nicola, Cagle, et al.,* as the law of this case!

Under the applicable and controlling *majority* law as represented by *Vaughn* in California and the host of cases across the country cited at pages 35 to 42 of this brief, this appellant most seriously submits that the trial court erred in overruling its motion for judgment n.o.v. and that such error should be corrected by this distinguished court and judgment for the defendant entered.

Specification of Error IV

The Court Erred in Not Granting Defendant's Motion For a New Trial.

A. VERDICT AGAINST CLEAR WEIGHT OF EVIDENCE

a) Trial Court Erroneously Adopted *Nicola* Line of Cases as Standard Against Which to Measure Sufficiency of Plaintiff's Proof.

Under specifications of Errors I and II, supra, the trial court's error in abandoning Montana substantive law

and the weight of authority and seizing upon the conflicting rule of *Nicola, Cagle et al,* is established. The court made such minority decisions the "law of the case"; therefore, for all the purposes of defendant's motions, including the motion for a new trial on the ground that the verdict was against the *clear weight of the evidence,* the court was applying an improper standard which has been shown not to require the proof of a dangerously slippery condition at the time and place of the accident by competent testimony as a condition precedent to proving a prima facie case.

b) "Clear Weight of Evidence" Rule

"Clear weight of the evidence", which is the yardstick for weighing the evidence under a motion for a new trial, is substantially less rigid from the defendant's viewpoint than the "substantial evidence" measure used under motions for judgment n.o.v.

> "Verdict can be directed only where there is no substantial evidence to support recovery by the party against whom it is directed or where the evidence is all against him or so overwhelmingly so as to leave no room to doubt what the fact is. (Citation). Verdict may be set aside and new trial granted, when the verdict is *contrary to the clear weight of the evidence,* or whenever in the exercise of a sound discretion the trial judge thinks this action *necessary to prevent a miscarriage of justice."* (Emphasis supplied.)
>
> *Aetna Casualty & Surety Co. -vs- Yeatts,* (CA Va. 1941) 122 F. (2d) 350, 354.
>
> 3 Barron & Holtzoff, 343 sec. 1302, "Fed .Practice and Procedure".

c) Court Erred in Not Granting New Trial

If the trial court had not adopted the *Nicola* line as the law of the case but had measured the proofs under the majority rule set forth under Specification of Error III, supra, then it would most certainly have granted the defendant a new trial if judgment n.o.v. were not granted. Of course, the Circuit Court will not again be here burdened by a summary of the facts and majority rule law. And it is enough to observe that since the plaintiff did not adduce substantial evidence in support of her verdict and judgment, as established in these foregoing portions of this brief, then, a fortiori, *the clear weight of the evidence,* as weighed against the majority rule, does not support the verdict! And if, for any reason, this defendant is not entitled to judgment n.o.v., at least it is entitled to a new trial.

B. THE AMOUNT OF THE VERDICT IS NOT JUSTIFIED BY THE EVIDENCE, IS EXCESSIVE AND PREDICATED UPON PASSION AND PREJUDICE

a) Pleadings, Facts, Instructions and Trial Court's Order Relevant to Damages.

Plaintiff, in her complaint, has specifically limited her prayer for damages in this case to the following items and to the following amounts:

1. General Damages, $10,000.00;
2. Out-of-pocket medical expenses, $400.00;
3. Future medical expenses, $2,500.00;
4. Loss of wages to time of trial, $3,000.00; and
5. Permanent loss of wages or earning capacity, $45,000.00.

She prays for $59,650.00, total damages. (R. 4-6.)

Her out-of-pocket medical expenses were limited by proof to a total of $148.50. (R. 64-65.) Her weekly loss of earnings was estimated at $78.00 per week, or a total of $3,000.00 at time of trial. (R. 60.) The testimony would have supported a finding that future medical expenses would be as high as $2,500.00. Also, assuming plaintiff proved a prima facie case, there appears to be no basis to argue that an award of $10,000.00 general damages was unsupported by the evidence. The above sums total $15,648.50. The remainder of the verdict, $20,851,50, must be accounted for as the jury's evaluation of Miss Murphy's alleged future loss of earnings or earning capacity.

There was no evidence introduced as to plaintiff's life expectancy; mortality tables were not used, nor was the court asked to take judicial notice of such tables; the present cost of an annuity equal to plaintiff's loss of earnings was not before the jury, nor was the court asked to take judicial notice of such value. Neither the court nor the jury took into consideration the plaintiff's age, effect of income tax on earnings, or her pre-existing arthritic condition and its effect on her future earning capacity.

The jury was instructed on the items of damages which were compensable but was not given any criterion upon which to base any evaluation as to plaintiff's alleged loss of future earnings or earning capacity.

Defendant moved for a new trial upon the ground, among others, that the amount of the verdict was not justified by the evidence, was excessive and predicated

upon passion and prejudice. Thus, the question of excessive damages was saved for review.

Complete Auto Transit -vs- Floyd, (CA 5th, 1958) 249 F. (2d) 396, 399;

Southern Pacific Co. -vs- Guthrie, (CA 9th, 1951) 186 F. (2d) 926, 932, 933.

In his order denying defendant's motion, the trial court held that the verdict was not excessive in light of the severity of plaintiff's injuries, pain and suffering, loss of work to time of trial and permanency of injuries. Nowhere in its order did the trial court allude to evidence which would have established some basis for the jury's evaluation of plaintiff's loss of future earnings or earning capacity at $20,851.50.

b) The Complaint Constitutes a Limitation of the Amount Plaintiff May Recover on any Specific Item of Damage.

It was pointed out at page 55, supra, that plaintiff's pleading and proof limited recovery in this case for all items of damage except loss of future earnings or earning capacity to the sum of $15,648.50. It is the general rule that special averments as to amount of alleged damages control over the general ad damnum clause in a complaint.

15 Am. Jur. 751, Damages, Section 309;

25 C.J.S. 749, Damages, Section 130;

17 C.J. 999, 1000, Damages, Section 301;

7 Bancroft's Code Practice and Remedies, 7976, Sec. 6034;

Kerry -vs- Pacific Marine Co., 121 Cal. 582, 54 Pac. 89, 92 (1898);

Muskogee Electric Traction Co. -vs- Fore, 77 Okla. 234, 188 Pac. 327, 328 (1920);

Frost -vs- Mighetto, 22 Cal. App. (2d) 612, 71 Pac. (2d) 932, 935 (1937);

And cf. *Wilber -vs- Wilber*, 63 Mont., 587, 207 Pac. 1002 (1922);

Hageman -vs- Arnold, 79 Mont. 91, 254 Pac. 1070 (1927).

In *Frost -vs- Mighetto*, 22 Cal. App. (2d) 612, 71 P. (2d) 932, 935 (1937), the trial court allowed special damages in amounts greater than those alleged in the complaint. In modifying the judgment to conform to the declaration, the court, quoting from *Meisner -vs- McIntosh*, 205 Cal. 11, 269 Pac. 612, said:

> " 'The authorities overwhelmingly support appellant's contention. "The rule is firmly established that irrespective of what may be proved a court cannot decree to any plaintiff more than he claims in his bill or other pleadings." 15 R.C.L. 604. "A judgment cannot be properly rendered for a greater sum, whether by way of debt or damages, than is claimed or demanded by plaintiff in his declaration or complaint." 33 Cor. Jur. 1164'."

Rule 9 (g), Federal Rules of Civil Procedure, 28 U.S.C.A. requires that items of special damage, when claimed, must be specifically pleaded, however, we have been unable to find any authorities specifically on the point contended for above. Of collateral interest, however, is the case of *Meyerkorth -vs- McKeone*, (D.C. Mo. 1945) 4 F.R.D. 323, which held that specific acts of negligence pleaded superseded general charges of negli-

gence. And in 5 Cyclopedia of Federal Practice, 600-601, Section 15.646, the authors state the following rule with regard to the binding effect of pleadings on the pleader:

> "A plaintiff or defendant generally is bound by that which he alleges or admits in his pleading, unless he withdraws it by proper amended or supplemental pleading; and he is estopped to contest or deny it, or to introduce proof in contradiction or variance thereof, to the surprise and material prejudice of the other party."

The above authorities are controlling in this case and limit plaintiff's recovery to the amounts and items of damages specifically alleged. Thus, her general damages are limited to $10,000.00, and her special damages to $5,648.50, plus that amount, if any, of the alleged future loss of earning for which proper proof was adduced. If the jury's guess of $20,851.50 for this last item isn't legally supported, the verdict cannot stand.

C. The COURT OF APPEALS HAS THE POWER TO REVIEW THIS QUESTION OF EXCESSIVE DAMAGES

There is no question but what the Court of Appeals has the right to review the District Court's order regarding damages. Section 28 U.S.C.A. 2106, as amended, provides that a court of appellate jurisdiction "may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review". The question of excessive damages has been given particular attention in the following cases which delimit the appellate court's power of review.

Plumbers & Steamfitters Union Local No. 598 -vs- Dillion, (C.A. 9th, 1958), 255 F. (2d) 820, 824;

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1957), 249 F. (2d) 396, 399-401;

Baldwin -vs- Warrick, (C.A. 9th, 1954), 213 F. (2d) 485;

Southern Pacific Co. -vs- Guthrie, (9 C.A., 1951), 186 F. (2d) 926;

New Amsterdam Casualty Company -vs- Wood, (C.A. 5th, 1958), 253 F. (2d) 71, 72;

Ohio Oil Company -vs- Elliot, (C.A. 10th, 1958), 254 F. (2d) 832, 835-836.

There apparently exist three rules regarding reversal or modification of a District Court ruling on excessive damages:

1) Cases in which it can be demonstrated that the verdict includes amounts allowed for items of claimed damage of which no evidence whatever was produced.

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951), 186 F. (2d) 926 at 931;

   Campbell -vs- American Foreign S. S. Corporation, (C.A. 2nd, 1941) 116 F. (2d) 926 at 928-929.

2) Cases in which the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion.

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951) 186 F. (2d) 926 at 932, (citing cases).

3) Where the verdict is "grossly excessive" or "monstrous".

   Southern Pac. Co. -vs- Guthrie, (9 C.A. 1951) 186 F. (2d) 926 at 933;

Plumbers & Steamfitters Union Local No. 598 -vs- Dillion, (C.A. 9th, 1958), 255 F. (2d) 820, 824;

Baldwin -vs- Barwick, (C.A. 9th, 1954), 213 F. (2d) 485 at 486.

D. THE VERDICT IS EXCESSIVE BECAUSE IT CAN BE DEMONSTRATED THAT IT INCLUDES AMOUNTS FOR ITEMS OF CLAIMED DAMAGE FOR WHICH NO EVIDENCE WAS PRODUCED.

As previously established, the plaintiff was limited in her pleading and proof to a total of $15,648.50, in damages for all items except that claimed for future loss of earnings or earning capacity. The question presented is whether, assuming that her proof will support a verdict for the fifteen thousand-odd dollar figure, is there any evidence to support any recovery for loss of future earnings or earning capacity? In determining the answer to this question, the court is bound to follow state court decisions and law relevant to measure of damages and amount of damage recoverable in any particular action.

28 U.S.C.A. 1652;

Vancouver Book & Stationery Co. -vs- L. C. Smith & Corona Typewriters, (C.A. 9th, 1943), 138 F. (2d) 635, cert. den. 64 S. Ct., 780, 321 U.S. 786, 88 L. Ed. 1077;

Mason -vs- U.S. (La. 1923), 43 S. Ct. 200, 260 U.S. 546, 67 L. Ed. 396;

Virginia Gas Co. -vs- Lafferty, (C.A. 6th 1949) 174 F. (2d) 848.

We are not asserting here that this Court's review of the evidence as to damages is restricted or relaxed by

a state court's decision or law. What we are asserting, is that state law is controlling where the issue presented is whether the verdict is excessive as a matter of law, or where the jury was improperly or insufficiently instructed, so long as adherance to the state court's decision or law does not subvert the right to trial by jury provided for in the Seventh Amendment to the United States Constitution.

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1958) 249 F. (2d) 396, 399;

New Amsterdam Casualty Co. -vs- Wood, (C.A. 5th, 1958) 253 F. (2d) 71, 72.

In this connection, therefore, it is important that the Court's attention is directed to controlling state court decisions on the question of excessive damages in this case. In pursuance of such a course, appellant cites the following cases for the proposition that the verdict in this case is clearly unsupported by any evidence and is excessive *as a matter of law*:

Chenoweth -vs- Great Northern Ry. Co., 50 Mont. 481, 487, 148 Pac. 330 (1915);

Hall -vs- Northern Pacific Ry. Co., 56 Mont. 537, 548-549, 186 Pac. 340, 344 (1919);

Everett -vs- Hines, 64 Mont. 244, 262 208 Pac. 1063, 1068, 1069 (1922) where the court held that the supreme court would have reduced the verdict had it any basis therefor, but that any reduction on its part would be based on speculation and therefore it returned the case for a new trial;

Liston -vs- Reynolds, 69 Mont. 480, 502, 223 Pac. 507, 513 (1923);

Conway -vs- Monidah Trust, et al., 51 Mont. 113, 118, 149 Pac. 711 (1915);

Wegge -vs- Great Northern Ry. Co. et al., 61 Mont. 377, 388, 203 Pac. 360, 363, 364 (1921).

In the *Chenoweth* case, supra, an award of $25,000.00 was reduced to $15,000.00, in a personal injury suit, where there was a total lack of evidence on plaintiff's life expectancy, mortality tables, or the present cost of an annuity equal to the present worth of plaintiff's loss of earning capacity. The court also took special note of the fact that the jury was instructed on only two elements of damages in the case: pain and suffering incident to the injury, and impairment of earning capacity. This is precisely the case here. In the instant case there is no evidence whatsoever to support any portion of the judgment which must, because of pleadings and proof, be attributed to compensation for loss of future earnings or earning capacity.

Appellant is aware that this Court may take judicial knowledge of various factors which were not brought to the lower court's attention, for the purpose of affirming or showing the impropriety of the decision below.

American Legion Post No. 90 -vs- First Nat. Bank & T. Co., etc. (C.A. 2d, 1940) 113 F. (2d) 898;

5 Moore's Federal Practice 1343, Section 4309.

While the Court went quite far in judicially noticing various factors which would support the trial court's opinion in the case of *Southern Pacific Co. -vs- Guthrie,* (C.A. 9th, 1951) 186 F. (2d) 926, 932, 933, that case is clearly distinguishable here. In that case we have a

59 year old man who was working at the time of his injury; he was required to retire at the age of 70; it is common knowledge that his job would probably have been protected to the retirement date by union seniority; there was apparently no indication that he was suffering from any physical illness or defect which would reasonably shorten his working expectancy.

In this case Miss Murphy was working only sporadically at the time of the injury; she had a general arthritic condition throughout her spine which in its natural course would have diminished her working potential, i. e., carrying heavy trays, etc.; and, no retirement date was alluded to in this case. There is no indication as to what importance plaintiff's age—50, would have on her working potential. Again we must consider plaintiff's job of carrying heavily loaded trays in considering what this potential is. We submit that taking into consideration all of the factors of the case there just is no evidentiary basis upon which this Court can affirm the amount of the verdict. To affirm the verdict in this case would require the Court to speculate on numerous factors for which there is a complete lack of evidence. We are not contending here that the verdict should be reduced by $20,851.50, for this would be usurping the function of the jury and infringing upon the right of trial by jury protected on the Seventh Amendment to the United States Constitution.

See:

Complete Auto Transit -vs- Floyd, (C.A. 5th, 1958) 249 F. (2d) 396, 399;

New Amsterdam Casualty Co. -vs- Wood, (C.A. 5th, 1958) 253 F. (2d) 71, 72.

Conversely, to affirm the judgment would be usurping the trial jury's function just as much, because it would require the court to wander through a forest of speculation seeking some phantom evidentiary path, judicially noticed or otherwise, to sustain the judgment. One route, we submit, is as fallacious as the other to follow.

We, therefore, contend that this court should, as did the court in *Everett -vs- Hines,* 64 Mont., 244, 262, 208 Pac. 1063, 1068, 1069 (1922), refuse to speculate on what the jury did, or in what manner they arrived at awarding plaintiff a verdict for $36,500.00. Rather, in view of the paucity of evidence on the loss of earnings or earning capacity, or some criterion to guide the jury in their deliberations, the only result consonant with justice and equity to both parties would be for this Court to grant a new trial so as to place the question competently before another jury.

While it cannot be shown from the record that the trial court erroneously excluded from consideration matters which were appropriate to a decision on the new trial motion, (see *Southern Pacific Co. -vs- Guthrie,* (9 C.A. 1951) 186 F. (2d), at 932), we do firmly assert that in its order the court did not make mention of any of the features discussed above. The verdict was affirmed and defendant's motion denied because plaintiff had suffered a serious injury which, resolving the conflict of medical testimony in favor of the plaintiff, was permanent. Thus, we submit, the order itself, graphically illustrates the failure of the trial court or the jury to take into consideration the essential lack of evidence on the issue of loss of earnings.

For the foregoing reasons, we submit that the judgment should be reversed and the matter sent back for a new trial.

CONCLUSION

Two basic errors of the trial court have been shown to exist in this record: first, the court erred in adopting as the law of this case the isolated holding of an inferior court in California (*Nicola* and *Cagle*). By so rejecting the majority rule across the nation in these unexplained slip-and-fall cases requiring substantial proof of the existence of a dangerously slippery floor condition at the time and place of the accident and apart from proof of the fall itself, the court placed itself in a position where it could not properly rule on either defendant's motion for judgment n.o.v. or for a new trial on the ground that the verdict was against the weight of the evidence. (Specifications of Errors I, II and III.) Applying the majority rule to this record entitles appellant to the granting by this Court of its motion for judgment, n.o.v., or, if for any reason that does not appear proper, then, most certanly, to a new trial.

The trial court also erred basically (Specification of Error IV-B) in not granting a new trial by virtue of the total absence from the record of evidence from which the jury could fairly, lawfully and properly arrive at the $20,851.50 future loss of earnings which they awarded by guess.

For the foregoing reasons and supported throughout this brief by pertinent authority, defendant respectfully

submits that it is entitled to judgment n.o.v., or, alternatively, to a new trial.

Respectfully submitted,

JAMES A. POORE, JR.
ROBERT A. POORE
URBAN L. ROTH

By Robert A. Poore
Attorneys for Appellant

Service of the foregoing brief admitted and three copies thereof acknowledged this 11th day of February, 1960.

s/ Leif Erickson
by J. R. Richards
Attorney for Plaintiff

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA BUTTE DIVISION

MILDRED MURPHY,

Plaintiff,

-vs- No. 690

SAFEWAY STORES, INCORPORATED,

Defendant

PETITION FOR REMOVAL

Comes now the defendant, Safeway Stores, Incorporated, in the above entitled action, and presents this, its verified petition for removal of the above entitled action to the above entitled Court, and for the grounds of said removal respectfully shows and represents to this Honorable Court as follows:

1.

That the above entitled action was commenced in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

2.

That your petitioner was served with a copy of the Complaint and Summons on the 16th day of December, 1958.

3.

That the above entitled action is now pending in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, for

the recovery of the sum of $59,650.00 for injuries to the plaintiff allegedly occurring on June 24, 1958.

4.

That your petitioner disputes said plaintiff's claims and demands and denies any and all liability with reference to all claims as alleged in plaintiff's Complaint.

5.

That said action is of a civil nature and that the matter and amount in controversy in said cause and the amount of damages claimed therein exceeds, exclusive of interest and costs, the sum of $10,000.00.

6.

That your petitioner, Safeway Stores, Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland, and was at all of the times herein mentioned and now is a citizen of the State of Maryland, and is not a citizen of or a resident of the State of Montana.

7.

Your petitioner states upon information and belief that the plaintiff, Mildred Murphy, was at the time of the filing of said action in the State Court, and at all times since has been a citizen of the State of Montana, and a resident of Butte, Silver Bow County, Montana.

8.

That your petitioner desires to remove this cause for trial thereof to the District Court of the United States for the District of Montana, Butte Division, upon the grounds of diversity of citizenship of said plaintiff and your petitioner as hereinbefore particularly set forth.

9.

That this petition of your petitioner is accompanied herewith by a bond of good and sufficient surety, conditioned that the defendant will pay all costs and disbursements incurred by the removal proceedings should it be determined that the case was not removable or was improperly removed.

10.

That accompanying this petition and filed herewith is a true and correct copy of all process, pleadings and orders served upon your petitioner, Safeway Stores, Incorporated, as appear in the file in the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, in the above entitled action.

WHEREFORE, your petitioner, Safeway Stores, Incorporated, files herewith the foregoing Petition for Removal, together with said bond and together with all of said process, pleadings and orders served upon your petitioner as appear in the files of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow, and prays that this action be removed to this Court.

JAMES A. POORE, JR.
James A. Poore, Jr.
ROBERT A. POORE
Robert A. Poore
403-405 Silver Bow Block
Butte, Montana
Attorneys for Petitioner,
Defendant, Safeway Stores,
Incorporated.

STATE OF MONTANA)
) ss.
County of Silver Bow)

WILLIAM REEVES, being first duly sworn, upon oath, deposes and says:

That he is the District Manager of Safeway Stores, Incorporated, the defendant in the above entitled action, for the State of Montana, and as such District Manager makes this verification for and on behalf of said defendant; that he has read the foregoing Petition for Removal and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WILLIAM REEVES

Subscribed and sworn to before me this 31st day of December, 1958.

ROBERT A. POORE
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission expires November 18, 1961

(Notarial Seal)

APPENDIX B

Index of Testimony on the Negligence Issue and Summary of the Negligence Evidence From View Most Favorable to the Plaintiff.

Index of Testimony on Negligence Issue

Summary of the Evidence on Issue of Negligence

Plaintiff came to defendant's store on East Granite Street, Butte, Montana, at about 10 to 10:30 o'clock A.M. on June 24, 1958. (R. 25.) She intended to buy some coffee. (R. 28.) Walking at her normal gait (R. 31) "in regular walking shoes" (R. 32, 31) with rubber lift (R. 32) heels 1⅞" high (R. 72) and tapering to a floor surface diameter of about ¾" (R. 86), she entered the store at the front entrance and proceeded toward the coffee counter. The surface over which the plaintiff walked was flat (R. 69) and was covered by

asphalt tile which had been in continuous use for about 20 years. (R. 193.) The store was well-lighted and nicely laid out. (R. 69.) The plaintiff described the floor as "very shiny and nice and clean and all that, real shiny". (R. 33.) She had traded at the store as a regular customer for a number of years, and although she didn't pay much attention to the floors, she didn't believe that they had ever before appeared so shiny—at least "not so much". (R. 35.) The floors at that time were washed and waxed twice per week—Monday night and Thursday night after the store closed. (R. 321.) Sometimes Mr. Rodoni, the janitor who attended to the floors, waxed the whole floor and sometimes he didn't—depending on the shape the floor was in. (R. 333.) But about the first of 1959, (about 6 months after the accident), Mr. Rodoni commenced as a regular thing to wax the whole floor once per week and the front part of the store, around the check stands where the travel was heaviest, twice per week. (R. 333.)

The manner of cleaning and waxing the floor was as follows: first the floor was mopped with soap and water and dried. Then a little over a quart of liquid, Waxcraft, heavy duty industrial wax, which the Safeway Stores have tested and adopted for use, (R. 172) was sprinkled over the aisle-ways from a garden sprinkling can (D. Ex. 30). Approximately 2500 square feet of aisles (R. 207) are so sprinkled. Then the mop (D. Ex. 31) which had been sprinkled with liquid wax to make it soft and absorbent (R. 325) was used to go over the floor to get wax spread out over the whole floor. In the sprinkling operation Mr. Rodoni endeavored to stay three

or four inches away from the fixture edges. After a period of time the wax would tend to build up where there has been no traffic on it, (R. 331) such as under the over-hang of the bins and fixtures (R. 332), and from time to time such excess wax was removed by scraping (R. 175) and treatment with hot water and lye. (R. 331.) After the wax had been spread out over the floor, it dried in about thirty minutes. (R. 327.) This system of cleaning and waxing had been employed by Mr. Rodoni since the fall of 1956 when he went to work for Safeway. (R. 320.) For the three years prior to the accident, plus the nine months thereafter up to the time of trial, approximately 1,050,000 individual sales had been had at the store (R. 185) and more people than that had traversed its floors. Only two other slip and fall accidents were experienced, (R. 184) and of these only the plaintiff claimed the slip was Safeway's fault. (R. 185.)

(Mr. Rodoni's testimony is at pages 320-335 of the Record.)

The floor of the store had been cleaned and treated in Mr. Rodoni's usual manner (R. 328) the night before the accident. The plaintiff entered at about 10:00-10:30 o'clock on Tuesday morning, June 24, 1958. (R. 171.) Approximately 70-75 trades people and customers would have been in the store by that time in the morning, (R. 206) but not all of them would have traversed the spot where Miss Murphy fell (R. 216-217). During the entire day when better than 550 customers would have traversed the various parts of the store (R. 206), no other person slipped or slid or fell (R. 211).

Miss Murphy entered by the main door (end of arrow in defendant's picture exhibit 11) and proceeded along the windows of said exhibit to the window-end of the produce counter where a turnstile had been formerly located (R. 217) and then to her right down along the produce counter for a distance of about 15 ordinary walking paces (R. 220) to where she slipped and fell. She described her fall as follows:

> "About that time my two feet shot out in front of me and I fell flat on my back and head." (R. 31.)
>
> "Well, I just fell flat on my back and my head hit the floor, and I really heard and felt it." (R. 37.)

She was not knocked out (R. 38) but was dazed. (R. 37.) There were a number of customers in the store at the time (R. 313) but apparently only certain of the store personnel heard the fall and went to Miss Murphy's aid. Rose Ledingham, a checker, who was at the check stand back of "St. John's Bread" in defendant's picture exhibit D-11 (R. 312) heard the fall and described it as follows:

> "Q. Will you describe that thump that you heard?
>
> A. Well, it was an out-of-the-way noise; it was like a thump; it was enough to attract your attention."

Mr. Albert Squires, produce department manager, who was 30 to 40 feet (R. 242) down the aisle that Miss Murphy was just entering on her way to the coffee counter heard the fall and described it as follows:

> "Well, I was in that aisle where I think she had fallen, but I wasn't sure I heard this, well, kind of a strange noise, just a little different noise than you

would normally hear, and I turned and looked up the aisle, and I immediately went toward her." (R. 224.)

Tom Hart, another Safeway employee who was working with Albert Squires in the aisle, estimated he was about 20-25 feet from Miss Murphy when she fell and that her fall could be described as a "thud" or perhaps "not quite so blunt as that". (R. 247.) She fell her full length and raised a bump on the back of her head about 4 to 4½" in diameter. (R. 136.) Her attending physician believed that she had experienced a severe contusion with mild shock and mild concussion. (R. 137.) Plaintiff's sister, Mrs. Rosa, said that Rose Ledingham, the checker, had told her that Miss Murphy "got a terrible fall". (R. 378.)

Miss Murphy had not gotten to the coffee display counter when she fell, and she fell when she was passing from the end of the produce counter into the head of the aisle where Squires and Hart were working. (R. 307 explaining Picture Exhibit D10, showing head at circled (2) and arrow in direction of body and feet; R. 37; R. 238 explaining Picture Exhibit D9 and the circled (x) and (y). This point was down into the store and away from the windows (Picture Exhibit D11) and about 15 paces from where the entry turnstile formerly had been (R. 220) and past where the shopping carts are stored (Picture Exhibit D10) and in the general area where worn spots on the floor (Picture Exhibit D-12) indicate heavy traffic. (R. 186.)

Miss Murphy had no explanation as to why she fell. She did not say that there was any slick or slippery sub-

stance on the floor. Mrs. Rose Ledingham, who went to her aid from her nearby check stand and helped her up, testified that in lifting her up and generally trying to help her, and in going to and from Miss Murphy and her check stand during the period when Miss Murphy talked to Mr. Frazer, store manager, she didn't notice anything slippery about the floor. (R. 309.) She saw no skid marks or any foreign substance, although she inspected the floor. She saw nobody else slip or slide of the people who were right there helping Miss Murphy. (R. 308, 309.) Mr. Frazer, store manager, who was summoned by loud speaker to the scene immediately upon its happening (R. 312) made an inspection of the floor (R. 210) as did Albert Squires, (R. 230), Rose Ledingham, (R. 227), and Thomas Hart (R. 246); and no one of these persons who was either immediately on the scene or there shortly afterward saw any liquid or foreign substance or skid or slip or heel mark or slipped while being around and about Miss Murphy or in helping her up, and nobody saw anybody else slide or slip in that area. The plaintiff's clothing was not stained or soiled. (R. 82.) Nothing was done to or changed about the area where Miss Murphy fell, and during the balance of the day nobody else of the store personnel and the 550 patrons (R. 206) slipped or fell or had any difficulties there. (R. 211.)

Miss Murphy was not slowing down or turning or stopping. (R. 36, 74.) She was on her way to the coffee counter as her first stop (R. 30), which was a ways down the aisle which she was just about to enter. There was no evidence whatsoever that she was walking other than down the aisle in the ordinary manner; and all the

witnesses, including herself (R. 37), place her fall in about the middle of the aisle which she had been traversing alongside the produce counter and at the head of the aisle she was about to enter. (Picture Exhibits D10; D12; D9.)

APPENDIX C

Item	Exhibit No.	Nature	Record References		
			Identified	Offered	Received
1	P- 1	X-ray	98	99	99
2	P- 2	X-ray	105	105	105
3	P- 3	X-ray	109	110	110
4	P- 4	X-ray	112	113	113
5	P- 5	X-ray	115	115	116
6	P- 6	X-ray	118	119	119
7	P- 7	Can of Wax	171-172	172	174
8	P- 8	Can of Wax Remover	174	175	175
9	D- 9	Photograph	196	197	197
10	D-10	Photograph	196	197	197
11	D-11	Photograph	196	197	197
12	D-12	Photograph	196	197	197
13	D-13 through D-29 inclusive	X-rays	253	254	255
14	D-30	Sprinkling can	335	335	335
15	D-31	Mop	335	335	335
16	D-32 through D-34	X-rays	341	341	341
17	D-37, D-38	X-rays	350	350	350
18	D-39	X-rays	348	348	348